Remote working: the long arm of employment rights

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More than a quarter of a million people emigrated from the UK in 2014. The most popular destination was Australia but other key destinations were the US, Spain, China and France. Of those making this major change in their lives a growing number are asking their UK employers if they can maintain an employment relationship with the UK business, even though the decision to leave the UK is entirely the employee's own.

Employers are under no legal obligation to agree to employees working abroad for personal reasons (unless they have unusual contracts that require this). But increasing numbers are willing to do so. After all, if the arrangement can be made to work, there is no logic in losing a valued employee.

What employers do not always appreciate are the legal implications of acceding to such a request. An individual living and working in England under an English law contract for an English company is clearly going to be covered by English employment legislation. But what if that individual wants to run the London finance team from her new home in Melbourne, Australia? Does the individual retain important rights under employment protection and equality legislation?

The recent case of Lodge v Dignity & Choice in Dying sheds some light. The UK Employment Tribunal heard the case first and decided that the employee, Mrs Lodge, was not protected by employment legislation relating to unfair dismissal and whistleblowing. The Tribunal found that Mrs Lodge's connection with Great Britain was not sufficiently strong to entitle her benefit from this protection. She was an Australian citizen, who had asked to work in Australia (having originally worked in London), and who had been paying Australian (not UK) taxes.

Mrs Lodge appealed this decision and the Employment Appeal Tribunal (EAT) allowed her appeal. The EAT said it made no difference whether the employer had asked Mrs Lodge to go to Australia or merely acceded to her request. At the time her contract ended, she was working for the benefit of the London business and there were plenty of other factors providing a strong connection with Great Britain, including the employer's identity, the terms of the contract and the fact that when she raised a grievance this was dealt with in London under the English employee handbook. It was also a relevant factor that it was not in dispute between the parties that Mrs Lodge could not bring any claims in Australia.

The case reminds employers that 'virtual employees' can have just as many rights in the UK -wherever they are based and for whatever reason – as those physically located here, provided the connection with Great Britain remains sufficiently strong. In particular, where an individual is doing work for a business conducted in Great Britain (as opposed to the global or branch operations of a British company) this is likely to provide the required strength of connection.

However, not all individuals working abroad will benefit from protection and if an employer is particularly keen to sever links with English employment law, it is possible this can be done in some cases. We summarised the legal position in an article in 2010, *When do individuals abroad have the protection of UK employment law* and the basic position remains largely unchanged.

Since that article, the importance of the 'sufficiently strong connection' test has been given further support in a number of important cases, up to and including the Lodge case. However, the facts of each case will differ, which is why it is important for an employer to decide what it wants the legal position to be when agreeing to an overseas transfer and to structure the arrangement to try to achieve the desired result at the outset.

Also, don't forget other legal considerations when allowing home working, especially health and safety obligations. To read the full article please click here.

For advice or further information, please contact a member of the Withers Employment Group.

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